

Jan. 3. 1750.

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Unto the Right Honourable the Lords of Council and Session,

THE

PETITION

OF

ALEXANDER Earl of GALLOWAY,

James Trail younger of Hobister, Thomas Mackenzie of Groundwater, David Covingtrie of Newark, Mr. Robert Scola of Hunton, Minister at Stronsa, and others, Heritors and Udalers of the Islands of Orkney,

Humbly sheweth,

THAT the Islands of *Orkney* and *Zetland* were anciently subject to the Dominion of *Norway*, till the Reign of King *James III.* of *Scotland*, when they were granted to the King of *Scotland*, but they enjoyed their own Laws and Customs, being the same with those of their Mother-Country for many Years thereafter; they had their own Senate or *Lawting*, their own Book of Law, agreeing with the Laws of *Norway*; they had their great Foud or *Lagman* as in *Norway*, and as there they had their Sub-fouds, *Lagreatmen*, the Members of the High-foud's Council, called *Raadmen*; their Lands were allodial, and none of them held by feudal Tenures, paying only an annual Tribute

bute or Land-tax to the Sovereign, called *Skat*, Stent or Taxation, the same as in *Norway*, and like this too they had their Weights, *viz.* Mark, Byfmer, Pund, Lifpund or Setteen, and the weighing Instruments, the Byfmer and Pundar, all peculiar to these Islands, and *Norway* and *Iceland*, and the *Feroes Norwegian* Provinces, and the *Norse* Language, all which will more particularly appear from an Appendix subjoined.

The Weights in these Islands have for very many Years past been in an uncertain and fluctuating State, so that they have never been at one for any considerable Time, nor have the Weights and weighing Instruments agreed with one another throughout *Orkney* and *Zetland* at any one Time ever since they deviated from the original Standard; and such has been the Growth of the Weight, after many Changes up and down, that the Mark which was in *Orkney*, (as can be proved by the most certain Evidence) of the Weight of 8 Ounces, as it always was, and to this Hour is, of this Weight in *Norway*, the Mother-Country, from whence the Weights and weighing Instruments of *Orkney* are derived, at present is no less than 20 Ounces Weight, as the Earl of *Morton* says, and claims it, and the other Weights of Setteens or Lifpunds, and all above, which are Multiplies of the Mark, the Root of the whole, have proportionally grown with the Increase of the Mark; and as the Feu and other Duties, which the Heritors in *Orkney* are liable to pay to the Earl of *Morton*, whether consisting of Meal, Bear, Butter, or other Rent in Kind, are all paid, and delivered by Weight, they are become extremely burdensome, and grievous to the Heritors, who, by means of the Increase aforesaid, are now made to pay in Proportion as five is to two; so that now they pay what in Reality is five Marks of Weight, in place of every two Marks of Weight that can of Right be demanded of them.

Besides the Feu-duties, or what, in the Language of those Islands, is called the Land-Mail, to which only those who have Feu



Feu Rights are liable, and besides the Teinds, the whole Heritors of *Orkney* were in ancient Times liable to pay a Land-tax, which is called *Skat*, which Taxation they paid to the King of *Norway*, while the Lordship of *Orkney* and *Zetland* made a Part of the Dominion of *Norway*, and they continued liable to pay the same Taxation to the Crown of *Scotland* from the Time that those Islands, upon the Marriage of King *James* III. with a Daughter of *Denmark*, were ceded to the King of *Scotland*; and this Land-tax or *Skat* was paid in Oil, Bear, &c. in Kind, by Weight, in the same Manner that the Feu-duties, after the same were introduced into these Islands, came afterwards to be paid; and consequently the Tribute or Taxation called *Skat* grew apace with the Growth of the Weights in *Orkney*.

Before the Year 1667, the voluntary Supplies granted almost every Parliament for the Exigencies of the State, out of the Lands in *Scotland*, were levied by Taxation in Proportion to the old Extent, excepting what was raised upon the Church, which was levied from the Bishops, Abbots and other Clergy, conform to their taxed Roll, whereof they relieved themselves at the Hands of their Feuars, by a Stent imposed by them rateably within their several Benefices or Territories; but as the Udalers of *Orkney* paid their *Skat* or Taxation conform to antient Custom, no Part of these Land Taxations were ever exacted from them. The Lands of these Islands are not to be found in any of the Tax-rolls, nor were their Lands ever extended so as there could be any Levies from them, conform to the old Extent, which in these Countries never existed.

In the Year 1667, when by an Act of the Convention of the Estates of *Scotland*, a Supply was granted to the Crown upon the Land, to be levied by way of Cess, in Proportion to a Valuation of the Lands made lately before, the Islands of *Orkney* and *Zetland*, which were included in the Valuation, were also charged with a Proportion of this Supply, which
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has been continued to be granted almost constantly every Year since that Time; and as this was only a Change of the Form or Rule for levying the Land-tax, as the same ceased to be granted or levied in *Scotland* by the Rule of the old Extent, which gave Place to the new Method of raising the same by the Valuation; so for the same Reason the *Skat*, or old Taxation, in these Islands, raised upon the Penny Lands, &c. gave Place to the new Method of levying the Land-tax there, conform to the valued Rent, so that the *Skat* or Taxation could no longer be raised there in the old Form.

Notwithstanding whereof, the Family of *Morton* has been in Use of demanding and exacting the *Skat* which they claim Right to, while at the same Time the Heritors are liable to pay the Land-tax to the Publick, which is levied from them conform to their valued Rents, in the same Manner that it is raised in other Parts of *Scotland*, whereby the Heritors in those Islands are subjected to a double Land-tax.

In these Circumstances, your Petitioners the Earl of *Galloway*, and other Heritors of *Orkney*, have commenced a Process against the Earl of *Morton*, in order to a Rectification of the Weights as presently used in *Orkney*, and to have the same reduced to the original Standard, and at the same Time for declaring their Immunity from Payment of the *Skat* or Land-tax which they paid to the Publick, in Proportion, and conform to the Rule for Payment thereof throughout the Kingdom of *Scotland*.

This Process having come in Course before the Lord *Elchies* Ordinary, his Lordship on the 7th of *July* last, was pleased, by his Interlocutor, to assoilzie the Defender from the Conclusion of Declarator with respect to the *Skat-duty*; but before Answer as to the other Conclusions, he ordained the Pursuers to produce their respective Charters, such of them as have Charters, and those that have none to depone as to their having no Charters, and to give in a Condescendence as to the Way and Manner they are to prove their Libel, and to
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produce the Vouchers and other Documents they are to insist upon for proving thereof; and by a subsequent Interlocutor of the 28th of *July*, his Lordship granted Commission of Consent to the Stewart-depute of *Orkney* and his Substitutes for taking the Pursuers Oaths.

In consequence whereof, such of your Petitioners as had Charters, have exhibited, or are ready to exhibit the same, and the rest have deponed; and they have also given in a Condescendence in the Manner directed by the Interlocutor.

But with regard to the *Skat*, they preferred a Representation to the Lord Ordinary, wherein they hoped to have made it appear to his Lordship, That the *Skat* was now ceased, and was no longer demandable. And, 2dly, That the Earl of *Morton* had no Right to the *Skat* by the redeemable Grant made to his Predecessor in the Year 1707, nor by the new Grant 1742, whereby the Crown's Right of redeeming these Islands from the Family of *Morton* was discharged and renounced; and the Defender having put in a very elaborate Answer, wherein several very material Things were, in the Apprehension of the Pursuers, mistated, the Lord Ordinary was pleased on the 11th of *December* last, to pronounce the following Interlocutor, *The Lord Ordinary having again considered the Representation, with the Answers thereto, refuses the Desire thereof, in respect of the Answers, and adheres to the former Interlocutor.*

As the Case is new, and of considerable Consequence to your Petitioners, they hope they will be forgiven for stating the Case to the Lords, in order to a Review of the foresaid Interlocutors of the Lord Ordinary.

And they will observe, That the Word *Skat* in *Norwegian* Language signifies Tribute or Taxation, as will appear from several Passages in holy Writ, as contained in a Condescendence annexed, and the *Skat* is specially distinguished from the Land *Skyld* or Land Duty, and that *Skat* or *Skot*, wherever any of the Gothick Dialect is used, is always the Term for a Tribute or

Taxation, as in *Sweden*, *Olaus* their King, who paid Tribute to the Pope, is by the *Swedish* Historians called *Skot Konung* or *Rex tributarius* upon that Account.

It will also be observed, That *Torfaeus* the Historian of these Islands relates, *lib. 11. p. 189*, That when King *Christian* of *Norway* gave up those Islands to the King of *Scotland*, he sent Letters to the Insulars, requiring them to own the King of *Scots*, and to pay their *Skat* or Tribute to him; and it is a Fact that is not disputed, that the said *Skat* for several Ages thereafter, was paid to the Crown of *Scotland*, and was paid for some Time to the Earls of *Orkney*, in virtue of special Grants thereof from the Crown, in the Reign of Queen *Mary* and King *James VI.* and is at this Hour demanded by the Earl of *Morton*, though without a Title under the Name of *Skat*.

It will be further observed, That the Lands in those Islands, when first ceded to the Crown of *Scotland*, were udal or allodial Lands, not held by any feudal Tenures, acknowledging no Superior nor Vassalage, nor liable in any Feu or Superior Duty or Casualty; that they continued in this State till after the Reformation, and thereafter in the Days of the Earl of *Orkney's* Power, a very few of those Islanders found it proper to take Grants of Feu, and some others did the same, from the 1643, to the 1669, the Period of the Family of *Morton's* first Grant: But a great Part of these Lands are to this Hour possess'd by the Proprietors as udal Lands, and consequently are liable to no Duty, but to the *Skat* or Land-tax, which they do now pay to the Publick, as it is collected in the more modern Form.

And what will serve for a Proof that the *Skat*, as the Name imports, is nothing else but a Tribute or Land-tax, is the ancient Rentals of *Orkney*, wherein the *Skat* is always stated in the first Place, and separate from the Land Mail or Feu-duty, which is always stated by itself, just as in *Norway*; the *Skat*, and Land *Skylä* are distinguished, the first being the Taxation

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to the Sovereign, and the other the Tenants Farms or Rent. And the same Distinction of the *Skat* from the Land-mail, is kept up and observed in the Books of the Farmers and Crown's Chamberlains of those Islands.

It was alledged for the Earl of *Morton*, that this *Skat* was constantly paid every Year, whereas the Taxation was only raised eight Times in the Course of 200 Years; and therefore the *Skat* and Taxation could not be the same: But, with Submission, the Argument concludes nothing; it was not the less the Land-tax that it was constantly and yearly paid, without the Formality of a new Imposition; it was with the same Propriety a Land Tax, as what is now constantly and yearly paid, although granted yearly by Parliament. At the same Time it is not true that we had only eight Taxations in 200 Years; Taxations were very frequent, as appears from the Records of Parliament, although few of the Taxation Acts are printed.

And it is real Evidence that the *Skat* was considered as the Land-tax; that the Taxation when granted by Parliament was never levied in *Orkney*, further than that the *Skat* was paid: Nor could the Rules of the Acts of Parliament for the Taxation apply to these Islands, where there was neither old nor new Extent: It was not that it was intended to exempt *Orkney* and *Zetland* from all Taxations, that they were not included in the Taxation Acts; for by the Act of Parliament 1661, for raising an Annuity of 40,000 *l. Sterling* yearly for the Lifetime of King *Charles II*, by an Impost upon Wines, Tobaccos, &c. and an Excise upon Beer, Ale, Aquavitæ, and strong Waters, *Orkney* is included as well as the rest of the Kingdom is included, and bears its Proportion; and yet by the Act of the Convention of the Estates of *Scotland*, granting a Taxation upon the Land, *Orkney* and *Zetland* was no more liable for this Taxation, than they were for former Taxations. There was no Rule established by this Act of Convention for raising any Part of the Taxation in these Islands; they continued still
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to be subject to the yearly Payment of their *Skat* as before.

It was said for the Earl of *Morton*, That *Orkney* and *Zetland* were subject to the Payment of the Taxation 1633; and to prove this, he observed that this Parliament lasted but a few Days, the King himself being present, and in haste to go away; that there was a Commission of Parliament, as it might be called, directed to the Lords of Secret Council, to consider and try the Necessity, Equity or Expediency of such Articles or Petitions as might be tendered to them, and to determine thereanent, as they might think expedient, and ordaining the Decrees, Statutes and Ordinances to be made by the Council anent the said Particulars and Petitions, or any of them, to have the Strength, Force and Effect of a Sentence and Act of Parliament, which the Earl observed was a Device or Expedient much of a Piece with what is yearly practised by the General Assemblies of the Church of *Scotland*, who supplied the Shortness of their own Endurance, by referring to a Commission the several Matters which the Assembly cannot overtake, to be finally determined even as they themselves might have done.

And it was said further, That amongst other Petitions, one was preferred for the Inhabitants of *Orkney*, praying *inter alia*, that the moveable Tenants thereof might be free of Payment of Taxation; and which Petition contains also another Article in the following Words, “ *Item*, It is craved by the “ *Udalers of Orkney and Zetland*, who have these many “ Ages, conform to the *Danish* Law, possess their Land upon Payment of *Skat* and *Teind*, that no Man be interposed “ between his Majesty and them to molest them, but that they “ remain his Majesty’s immediate Vassals, for Payment of “ *Skat* and other Duties conform to their Rentals, ay and while “ his Majesty conform their Rights to the Laws of the Kingdom.” From which he observes, That the removeable Tenants petitioned to be free from the Taxation, but so did not the

the Udalers, who consequently submitted to the Taxation imposed upon them by the Act past in that Parliament.

Your Petitioners must leave it to these who are better acquainted than they are with the Constitution of the Parliament of *Scotland*, and the Proceedings of the General Assembly of the Church of *Scotland*, to examine the Justness of the Comparison made betwixt them in the Particulars aforesaid; but that Part of the Observation appears to be of no Consequence in the Case.

Your Petitioners have not seen the Commission referred to by the Earl of *Morton*, nor do they think it material for them to enter upon an Enquiry into the Nature and Powers of that Commission, if any such was; but your Petitioners believe that a Commission was appointed at the Calling of the Parliament in Terms of 218. *Act. 14. Parl. James VI.* which was thereby appointed to meet twenty Days before the Parliament, to receive all Manner of Articles and Supplications concerning general Laws, or touching particular Persons, to the Effect that things reasonable and necessary might be formally made and presented in a Book to the Lords of the Articles in Parliament Time; and if this was the Case, the Petition referred to would be presented before, and not after the Parliament: But whether it was before or after, is nothing to the Case; for if it was after, there was no Occasion, nor possibly could it have been of any Effect to prefer such a Petition to a Committee of Parliament, who, whatever Powers they might have, it cannot be thought that they had the Power of repealing an Act past in the Parliament itself, from which they derived their Authority. If such had been their Power, it would have been even more extensive than the Powers of the Commission of the General Assembly of the Church of *Scotland*, which cannot repeal the Acts of the General Assembly itself; and if the removeable Tenants of *Orkney* were by the Act of Parliament liable to the Taxation then imposed, they

they could not have been discharged by this Commission of Parliament; and therefore, when they pray to be exeemed from the Taxation, they must mean nothing else by Taxation, but what in the other Part of the Petition is called the *Skat*, which is a convertible Term for Taxation.

And that this was only their Meaning is plain from the Taxation Act 1633, itself, which contains a Clause, whereby after narrating the great Abuse that had been committed by sundry of the King's Leiges in compelling poor Farmers, Tenants and Labourers of the Ground to relieve them of the whole Burden of bygone Taxations, whereby the Tenants were impoverished; therefore statute, that the Taxation should only be paid by such as have free Rents, Lands and Goods of their own, and that no Persons whatever exact or compel his Tenants or Farmers removeable, who pay Farm and other dear Duty for the Lands occupied by them, to pay any Part of this present Taxation, or to seek Relief at their Hands of the same: And as thus it appears, that the whole removeable Tenants in *Scotland* were exeemed from Payment of this parliamentary Taxation; if these Islands were liable to the Taxation then imposed, a Petition from the removeable Tenants in *Orkney*, to exeem them from what in that Case they were exeemed from by the Act, imposing the Taxation itself, would have been extremely ludicrous; and if we shall suppose, that the Petition was preferred before the Act of Parliament was past, it could never be meant of the Land Taxation, that the Parliament was about to impose. It would have been equally unnecessary to have made such Request before the Act of Parliament, as after, because the same Clause, with respect to the removeable Tenants, appears in the Taxation Act 1621, of which the Clause in the Taxation Act 1633, as to this Particular is only a Transcript.

And therefore it is impossible, that the removeable Tenants in *Orkney* could mean any Thing else by a Taxation, but the *Skat*, and the Occasion of the Application has been, that as in
Scotland,

Scotland, the Sheriffs and other Collectors of the Tax imposed upon the Laities Lands, and the Church-men, for their Relief, oppressed the poor Tenants, an Abuse corrected by the Acts of Parliament 1621 and 1633; so these who had the uptaking of the *Skat* in *Orkney*, had attempted to squeeze the same from the poor Tenants there; to correct which Abuse this Petition has been intended, and it will be observed, that as the removable Tenants petitioned to be free from the *Skat*, which they call Taxation, so the Udalers aver, that conform to the *Danish* Law, they had possess their Land for Payment of *Skat* and Teind only; they do not petition to be free from the parliamentary Taxation, to which they had never been subject: Their only Request is, that they might remain his Majesty's Vassals for Payment of Scat, and other Duties, and that none other might be interponed betwixt the King and them. They had been grievously oppressed, not many Years before, by *Patrick* Earl of *Orkney*, who was brought to condign Punishment, and forfeited *Anno* 1612, upon that Account; and it was from their Fears, that another Grant might be made, that might make them depend immediately of a Subject, that they presented this Petition, which is so far from proving that these Islands were subject to the parliamentary Taxation, that it is a Proof of the contrary, and, in Fact, it is not true, that ever the Udalers of *Orkney* paid any Taxation imposed by Parliament for their Lands before the 1667, nor was the Rule for levying the same applicable to *Orkney*; these Taxations which were imposed in consequence of a voluntary Offer of the Subjects by their Representatives in Parliament, and by the Lords of Parliament, could not be extended to *Orkney*, which never had a Representation in Parliament, where a Taxation was imposed till the Restoration. The only Person in *Orkney*, who was subject to the Taxation, was the Bishop of *Orkney*, who as such was a Member of the Parliament and Convention, and was

was subject to pay his Proportion with other Church-men, in consequence of his own free Offer.

From what has been said, it is a Consequence, that as these Islands were free from the parliamentary Taxations, in respect of the annual *Skat*, or Taxation payable by the Landholders thereof: So when they came to be subject to the Cess, and liable to pay the Land-tax collected by the valued Rents, they fell in course to be free of the Taxation called *Skat*, formerly levied by the Penny Lands, and their not being expressly excoemed from the *Skat* by the Supply Act, after they were made subject to the Cess, has only proceeded from the Opinion, that the Taxation could not be twice levied, conform to different Rules; it was thought, that the Obligement to pay the *Skat*, was satisfied by the Payment of the Cess.

And that this was so understood does further appear from the Tenor of the Grants to the Earls of *Orkney*, and to the Earls of *Morton*; for in the Grants to the former, the *Skat* is expressly mentioned, as well as the Toll for Ships, and the Money for Anchorage of Ships, and Customs and other Branches of the Revenue; and the Right of Admiralty, and the Grant 1643, to the Earl of *Morton*, bears a special Relation to the Grants in Favours of the Earls of *Orkney*; but in the Grant to the Earl of *Morton* 1707, as the Dues for the Anchorage and the Toll of Ships are not mentioned, because those had been discontinued to be paid ever after the Treaty of *Breda*; so there is not one Word mentioned of the *Skat* which was now payable by way of Assessment for the publick Service; and yet the Earl of *Morton's* Grant 1707, is extremely particular: It mentions the Feu-duties, Mails, Farms, Kains, Customs, Casualties, Services, Profits, and other Duties, in many Places, both in the Signature and in the Charter; but the Word *Skat*, which was a very considerable and well known Thing, is not once to be found in either the Signature or Charter 1707, no more than it is in the Charter

1742, in which due Care seems to have been taken to express every Thing which was intended to be granted.

Thus your Petitioners hope they have shown, that the *Skat* is now no longer due; and if it were, that it is not granted to the Earl of *Morton*.

Again, it was urged, that the Islands, when erected into an Earldom or Lordship, were granted to Earl *Robert* of *Orkney*, and afterwards to his Son *Patrick*, who both had Right to the *Skat*, being *per expressum* conferred upon them; also, that the Grant made to the Earl of *Morton*, anno 1643, refers to, and confers in general whatever had been granted to the Earls of *Orkney*; and tho' by the Gifts of 1707, and 1742, the *Skat* is not granted, neither *per expressum*, nor by any Reference, yet the Earldom of *Orkney*, and Lordship of *Zetland*, being thereby conferred, the *Skat*, as is alledged, is herein comprehended, as Part and Pertinent. Thus the two Earls of *Orkney*, and also the former Earls of *Morton*, had Right to the *Skat*, not as a Part and Pertinent, but because it was *per expressum* given to them, or by Reference; and yet the Defender pretends he has Right to the *Skat* also, not as passed to him *per expressum*, nor by any Reference, but as a Part and Pertinent: Besides, this Argument proves too much; for if the King's *Skat* were indeed comprehended in his Gifts, as Part and Pertinent of the Earldom and Lordship, because granted *per expressum* to the Earls of *Orkney*, or by Reference, to the former Earls of *Morton*, alike with the Earldom or Lordship itself, it would thence follow, that the Toll of Ships, the Anchorage-money, the Rights of Admiralty, and the Customs and Imposts of Merchandice, were herein alike comprehended, having been conferred upon the Earls of *Orkney*, and enjoyed by them and the former Earls of *Morton*, alike with the *Skat* of the Islands; and yet to none of those Branches of the publick Revenue does the Defender lay Claim, as Part and Pertinent of the Earldom and Lordship, except to the King's *Skat* only, which yet by his

Gift is no more conferred than the rest, and besides is the only Branch perhaps of those publick Revenues, which in the Year 1667, was not in the Crown to confer, having sunk or ceased upon the new Assessment.

It was said for the Earl of *Morton*, That if the *Skat* was to be taken from him, it had been more for his Interest to have applied to Parliament for Payment of his 30,000 *l.* than to have procured an Act of Parliament discharging the Redemption. It was also suggested, that the Charter 1707 was a Grant due to him in Justice, whereby he was restored against what had been brought about by Party Influence in the Year 1669, when his Predecessors were deprived of the Earldom of *Orkney*, which they had so just a Title to; and therefore his Grants 1707 and 1742 ought to be beneficially explained for him, so as to include every Thing that is contained in the former Grant, which he ought not to have been dispossessed of.

Your Petitioners think it improper for them to enter minutely upon the Consideration of these Matters, they are hopeful the Court will not find Cause to explain or extend a Grant, so as to subject the Pursuers to pay double Land-tax, *first*, to the Publick, as other Subjects do; and *2dly*, to the Earl of *Morton* their Fellow-subject. And as to his Lordship's late Grants their being given *quasi per modum justitiæ*, the contrary appears from the Act of Parliament 1669, which ascribes the Grants to the Earl of *Morton*, to Importunity on one Side, and a Prevalency of Goodness and a complying Inclination on the other, and also from a Petition to Parliament for the Earl of *Morton* 1693, and from an Answer for his Majesty's Advocate, both ingrossed in an unprinted Act of Parliament of that Year, it appears, that the Reduction and Act of Parliament 1669 were homologated by the Earls of *Morton*, who, by two voluntary Deeds, renounced their Pretensions to these Islands for ever; and your Petitioners will oppose what was said by his Predecessor in a Memorial to the Court of Session

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Anno 1718, wherein the Earl of *Morton* says, that the Gift 1643 was granted without good Causes, for the honourable Aliment and Support of the Family of *Morton* only, and was therefore effectually reduced by a solemn and formal Decree of the Lords of Session, ratified in Parliament *Anno* 1669: That the Gift 1707 was by no means a Restitution upon the Merits of any former Gift, because Restitutions must complain of Injuries and Injustice, which he neither did nor could do, with regard to the Reduction 1669, having proceeded upon uncontrovertible Grounds of Law, and conform to Laws not only standing in Force, but absolutely necessary for preserving the Patrimony and Demain of the Crown; that it was no other than the Reduction of a Right without a Title, a Right manifestly against the Laws of the Land, to the Possession whereof the Crown might have summarily entred even before, or without the Reduction, in Terms of the Act of Annexation 1669; *quo fronte* therefore, says the Earl in that Memorial, can the Grant 1707 be called a Restitution *per modum justitiæ*? It was an original Grant, an original new Grant by and from the Favour of the Sovereign; for the Earl owns, and of absolute Necessity must own this whole Gift as a favourable Donative from the Crown, a Donative of Favour, a Gift which he owes to the Bounty of the Crown, fought and craved out of nothing but Favour. And as this is the Earl of *Morton's* own Declaration with respect to his Grants, and as your Lordships found that his Gifts proceeded, and were granted *per modum gratiæ*, and not *per modum justitiæ*, there seems to be no Foundation for his present Pretensions, that they should be beneficially interpreted, and extended to whatever was contained in former Grants, as if the late Grants were only a Renewal of the former, and reponing his Lordship *per modum justitiæ* to his antient Right.

It may be very true, that the Earl of *Morton* meant to levy the *Skat* in all Time coming, as comprehended under his Gift, but it appears he did not think it proper to mention it

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expresly in his Gift. And as to the 30,000 *l.* whether the Earl was Creditor to the Publick or not when the Grant 1643 was made, the Pursuers and the other Heritors of *Orkney* could have wished that his Lordship had made Application for Repayment; they would most chearfully have contributed their several Proportions thereof, and have made good the Sum to the Earl, on Condition of their obtaining from the Crown a Grant in their own Favours of what the Earl of *Morton* may be intitled to demand from them severally, in consequence of the Grants he has obtained.

The Earl of *Morton* alledged also, that he had possessed the *Skat* for above 40 Years, and thus had Right by Prescription: But *imo*, It is not true in Point of Fact, the *Skat* has not been paid by the Petitioners for several Years, and the Earl's Right only commenced in the 1707; and *2do*, In Point of Law, there can be no Prescription without a Title, and the *Skat* is not comprehended in the Earl of *Morton's* Grants.

May it therefore please your Lordships, to alter the Interlocutors of the Lord Ordinary, and to find, that your Petitioners are not liable to pay Skat to the Earl of Morton, and to decern in the Conclusion of Declarator of your Petitioners Immunity from the Skat.

According to Justice, &c.

THO. HAY.

A P P E N -

APPENDIX.

TWO Things are chiefly here proposed : 1st. To illustrate, that the true and genuine Signification of the Word *Skat*, a Term never used by any Feudalist, is of the same Import or Signification, as Cess or Land-tax with us. And 2^{dly}, To shew that the Polity or Laws and Customs of *Orkney*, in Matters of civil Right, were to remain with the Inhabitants the same after as before the Annexation to the Crown of *Scotland*, and to give some Hints or Specimen wherein their System was peculiar to themselves.

To account the more satisfyingly for this Peculiarity, the Court will be informed, that when the Sovereignty of these Isles was engaged to the *Scots*, the Inhabitants were to change their Master, but not their Condition ; for *Christian* of *Norway* purposing to redeem these Islands, and being sensible of the Confusion that might attend any Change in their publick State, made it an Article of the Treaty that they should retain their own Courts, little Parliament, or, in their Language, *Lawting*, their Laws, Magistrates, and whole Customs, as under the Dominion of *Norway* ; and this *Norwegian* System was afterwards recognized by the Kings of *Scotland*, in a Multitude of Examples, several of which shall be here condescended on : But as it may be naturally supposed that the Farmers and great men, who from Time to Time obtained Grants of the Revenue of these Islands from the Crown, did introduce Innovations into their peculiar System, wherever these Innovations would turn to their own Advantage ; it can be no Surprize that the Inhabitants so distant from the Metropolis of *Scotland*, and entire Strangers to the feudal Customs prevailing there, came to have their Land Rights so blended by the Power and Privilege of the first Exactors, as to pave
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a Way for subjecting them insensibly to Duties, which by the Nature of *Allodium*, or udal Rights, (the only proper Term among them) they ought not to pay.

This will in some Measure, if attended to, account for their long Silence, even when their Interest was so much at Stake.

But not to digress further in a Matter that can be distinctly made out, and may even be supposed :

The Petitioners, for instructing the first Head, namely, that *Skat* is a Term synonymous to our Cess or Land-tax, beg leave to refer to the following Authorities from the *Nurse* or *Norwegian* Translation of the Bible, *viz.* *Matt. xxii. 17.* which our *English* Version renders, *Is it lawful to give tribute unto Cesar, or not ?* The *Norway* Version renders it thus, *Er det tilladt at give Keyserrer Skat ?* That is, *Is it lawful to give Skat unto Cesar.* Then follows : *But Jesus perceived their wickedness, and said, --- Shew me the tribute-money. --- Lader mig see skattens mynt, ---* says the Version of *Norway* ; *Let me see the money of the Skat.* Also, *Rom. xiii. 7.* *Render therefore to all their dues, tribute to whom tribute is due, custom to whom custom. ---* The *Norwegian* Version renders thus, *Saa giver alle de ting i ere de skyldige ; den skat som bor skat, den told som bor told. ---* The *Skat* to, whom *Skat*, the *Toll* to whom *Toll.* — Also, *Luke xi. 1.* --- *There went out a decree from Cesar Augustus, that all the world should be taxed.* The Version of *Norway* renders thus, *Dor udgik en befalning fra Keyser Augusto, at alle verden skulle beskribe till skat ; ---* *That all the world should be censed or inrolled, in order to a Skat. ---* Then the different Versions run thus : *And this taxing was first made when Cyrenius was governor of Syria. --- Denne beskridelse var den allerforste som skeede der Cyrenius var landskerre i Cyrien. And this census or enrolment was first made, &c. --- And all went to be taxed, every one into his own city. --- Og de ginge alle at lade sig bescrive till skat, huertil sin stad. --- And all went to be*
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enrolled for the skat, every one into his own city.---And Joseph went also up from Galilee,---to be taxed with Mary his espoused wife. *Da. drog. ag Joseph op af Galilaea; ---at hand skulle lade sig bescrive till skat, med Maria, sin trolovede hustrue.---In order to be censd for his Skat, with Mary his espoused wife.* So also, in many Passages of the Old Testament, as well as the New, the Words rendered Tax or Tribute in the *English* Version, and their Derivatives, are in the *Norwegian* Version expressed by the Term *Skat*, and its Derivatives. Therefore, in the Language of *Norway*, which was likewise the Language of these Islands, *Skat* is the Term for Tax or Tribute, which is not in the Nature of Rent or Feu-duty.

And as *Skat* in *Norway*, and also in these Islands, is the Term for Tax or Tribute, so is it in other Countries of *Europe*, wherever the *Gothick*, or any of its Dialects, is vulgarly used. Thus, as is already observed, King *Olaus*, the Apostle of *Sweden*, is surnamed *Skot-Konung*, i. e. the Tributary-King, because he sent Tribute to the Pope, by Advice of his Bishops. *Rex Sueciæ Olaus, i. e. Skot-Konung, Tributarius Rex cognominatus esse existimatur, quod hortatu Præsulum Sueticorum ad Pontificem Romanum misisset tributum.* Loccen. Hist. Suec. Lib. 2. Hence in old *English* also, or *Saxon*, which has a near Affinity with the *Gothick*, the Borough's Part of the publick Land-tax is termed *Skot*, and their Imposts *Lot*, Terms at this Day, and in this Sense kept up in all the Cities and Boroughs of *Great Britain*: All which proves, that the King's *Skat* in these Islands from the Term itself, was Tax or Tribute, which is not Rent or Feu-duty, nor in the Nature of it. And as this Tax or Tribute issued from Land, like Hideage in *England*, and the old Taxation in *Scotland*, it was therefore the old Land-tax or Ground-subsidy of the Islands paid for the publick Exigencies of the State.

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As *Skat* in these Islands, and wherever it is known, is the Term for Tax or Tribute, so it appears indeed the very Thing, as may be established from the following Considerations:

1. When the Islands were pawned to the *Scots*, King *Christian* of *Norway* sent Letters to the Insulars, requiring them to own the King of *Scots*, and to pay their Tribute to him, till the Islands should be redeemed, *Torf. Orcad. lib. 11. p. 189.* Therefore by these Insulars, there was a Tribute at that Time due to the King of *Norway*, which was afterwards to be paid to the King of *Scots*; and yet of them the King of *Scots* received no Tribute, nor claimed any but the *Skat* only, which is therefore the Tribute mentioned in *Christian's* Letters, and yet it cannot be pretended, that Feus were then known there.

2. As *Skat*, in *Norway*, is the Term for Tax or Tribute, so Farm-rent, in Contradistinction to this, is there called Land-skyld, *i. e.* Land-duty in the *Orkneys*, Land-mail, by which Crown Rent also, or Feu-duty, is exprest, in Contradistinction likewise to *Skat*; and hence those distinguishing Marches kept up betwixt them, not only in the Rentals or Surveys of the *Orkneys*, but likewise in the Books of the Farmers and Grantees of the Islands, the King's *Skat* being first entered and charged by itself, under its proper Name, and a Part from this, as a distinct Thing, the Rent or Feu-duty, called Land-mail, by itself, under its proper Name; therefore *Skat* cannot be that, nor in the Nature of that from which it is thus distinguished, *i. e.* Rent or Feu-duty, but in the Rental or Survey of the *Orkneys*, *Anno 1595*, now in the Laigh Parliament-house, *Skat* is englished by the Word Stent, which is a convertible Term for Extent; or Land-Tax, therefore *Skat* is Land-tax.

3. In *Domesday* Book, the Entries of Land, in order to Hideage, are first by Counties, then by Towns or Manors, and lastly by Hides, Half-hides and Virgates of Land, according to which the Hideage is limited; so also in the *Orkneys*

neys, and in *Zetland*; the Entries are first by Islands or Parishes, then by Towns or Villages, and lastly by Mark-lands, Pennies and Farthings, according to which the *Skat* is limited; therefore *Skat* in the *Orkneys*, and in *Zetland*, is in the Nature of *Hidage* in *Domesday Book*, i. e. Tribute-real, Land tax, or Ground-subsidy.

4. *Beneficia* or Fees, are not known in *Norway*, nor in these Islands were they known, till an Entrance was wrought for them by the Reformation; and yet in these Islands, as in *Norway*, all Lands owed *Skat* to the State, whilst Fees here, as well as in *Norway*, were yet unknown, and therefore *Skat* cannot be Feudal Rent, but Cess, or the publick Tax, for Support of the State, from which no *Udaler* pretends Exemption, but, except in these Islands, no *British* Subject pays it twice.

It is further observable, that in the Records of Parliament, anno 1592, the Earldom of *Orkney*, and Lordship of *Zetland*, are dissolved from the Crown, and confirmed to Earl *Robert* of *Orkney*, and his Son *Patrick*, in Terms of a Grant made to them anno 1591, to which this Act of Ratification and Dissolution makes Reference, and by which the Islands are granted. — *Unà cum tolloneis, anchoragiis, custumis, le wattle, forcòp-land, setterton, austercòp, skatis, land-mailis, wrack, waith, wair, & aliis juribus & divoriis quibuscunque, dictis comitatui & dominio pertinen.* All which is a-new erected into an Earldom and Lordship, alike with the Jurisdiction, Rights of Patronage, and other Patrimonies thereof.

Also, in the 1612, when this Grant was taken away, the whole Lands, Isles, Holms, and others, within the Earldom of *Orkney*, and Lordship of *Zetland*, are annexed to the Crown, — with the haill Lands called *Udal-lands, Rait, Aymin, Saymin, Tolls, Anchorages, Customs, Wattle, Forcòp-lands, Setterton, Austercòp, Skats, Land-mails, Wrack, Waith, Wair, Wais*, and other Rights and Duties whatever, pertaining to the

said Earldom of Orkney, and Lordship of Shetland,——as contained in the Infestments of Patrick Earl of Orkney.

Also, in the 1624, the Lands of Orkney and Shetland are granted to Sir George Hay of Kinfawns, then High-Chancellor of Scotland,——*cum universis le quoy-landis, islis, sker- ris, holmis, out-breckis & skatis, eisdem adjacen. vel spectan. & pertinen.* Also, all other Lands whatever, which had pertained, or been annexed to the Earldom of Orkney, and Lordship of Zetland, whether the Tenentry of Birsa, the Bishoprick of Orkney, or the Lands of the Chapter,——*cum tenen. tenan. libere tenentium servitiis, partibus, pendiculis & pertinentiis quibuscunque terrarum, insularum, le quoy-landis, skerreis, holmis, out-breckis, skatis, aliorumque supra mentionat. ac cum universis privilegiis, immunitatibus, libertatibus, tolloneis, custumis, anchoragiis, le wattle, forcòp-landis, setterton, austercòp, skatis, land-mailis, wrack, waith, wert, wair,——casualitatibus, immunitatibus, decimis, feudifirmæ firmis & divoriiis, aliisque proficuis & divoriiis quibuscunque, terrarum, insularum, le quoy-landis, skerries, holmis, out-breckis, skatis, beneficiorum ecclesiarum, capellaniarum, prebendarum, le stellaries, burgorum in baronia, portuum marinorum, piscariarum, aliorumque supra specificat.*——All which Lands, (it follows) Islands, Quoy-lands, skerries, Holms, out-brecks, Skats, and others above-written, with the whole Parts, Pendicles, and Pertinents above expressed, in whole or in Part, formerly belonged to the Crown, as Part of its Patrimony, or had devolved to the King, either by the Process and Doom of Forfeiture against Earl Patrick of Orkney, or by the Contract of Permutation made betwixt the King and the Bishop of Orkney; or lastly, by the Resignation *ad remanentiam* made to his Majesty by the late Sir John Arnot of Barswick. And afterwards in the Reddendo: *Reddendo annuatim——pro omnibus & singulis terris, insulis, le quoy-landis, skerries, holmis, out-breckis, skatis, beneficiis, ecclesiis, capellaneis, aliisque præscriptis.*——Great Seal Register, Book 50. Num. 355.

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All which proves, that in these Grants, and publick Acts, the *Skat* is not considered as a Pertinent of the Earldom, but as a Thing that might be parted from it, like the Toll of Ships, the Customs and Imposts, and those other Branches of the publick Revenue conferred along with it. And it adds no small Strength to the Argument, that in one of the Confirmations in Process, viz. of the Grant of the Land of *Nunton*, made by the Chaplain of *St. Katherine*, with Consent of the Bishop and Chapter, anno 1577, the *Skat* is entered in the *Reddendo*, next after the Feu-duty, in these Words,—*una cum skatis regis in rsntali regio content*. And at the Close of the *Reddendo*, when the Feu and augmented Duties are extended into one Sum, the King's *Skat* is again distinguished from the Feu-duty, and mentioned by its proper Name, — *Cum Skatis regis prout in rental regio content*. And here the *Skat* being termed the *King's Skat*, at a Time when the Earldom or Lordship was not in the Crown; this shews it could be no Part of the Earldom or Lordship, but a proper Branch of the publick Revenue, to which the Grantee of the Crown had no Right, nor afterwards could have claimed any, if *per expressum* it had not been conferred.

So likewise, in the Dissolution of the Islands, anno 1707, and the consequent Charter, the Parts and Pertinents of the Earldom are all enumerated, and this with more Precision than at any Time before; whilst the Rights of Admiralty, the Customs and Imposts of Merchandice, and those other Branches of the publick Revenue which then subsisted, instead of being Parts of the Earldom, are considered as distinct things, and independent, such as from the Earldom might be granted, and then in Fact were granted alike with the *King's Skat*, which was no more. And as the *Skat* had formerly ceased, and for this Reason was not then conferred, nor in the Crown to confer, the Defender therefore has no Right to it, more than to those

those other Branches of the publick Revenue, which are not in his Gift, his Claim to all being alike taken away.

The *second* Head is intended to show, that after the Cession of these Islands, their civil Policy was to remain, and the Proofs of this will also give Occasion to exemplify many material Instances, wherein their peculiar Systems stood very opposite to ours.

• Their Form of making Laws or Acts for Administration of Justice, while under the King of *Norway*, was by their little Parliament or Senate, called *Lawting*.

• Of this frequent Mention is made in the *Orcades* of *Torfaeus*, but more particularly, the constituent Members are contained in an Act of their State yet extant, and which can be exhibite if there is Occasion, and is noticed by Doctor *Wallace* in his Description of these Islands, where it is said, that the Act pass, *in nostra publica & generali sessione*, in the Language of the Country called *Lawting*.

In that Act they address the King of *Norway* in the following Terms: *Illustri & excellentissimo domino nostro Norvegiæ regi, Thomas Dei & apostolicæ sedis gratia Episcopus Orcadiæ & Zetlandiæ, canonici Ecclesiæ Cathedralis, Sancti Magni martyris gloriosissimi legifer cæterique procures, nobiles, populus ac communitas, sive plebs coram deo in fide, & fidelitate attestamur, &c.*

This plainly evinces the Form of their Meetings, comparing greater Matters with small, to have resembled our *Scots* Parliaments, where the Lords, Clergy and Commons, sat all in one Body: Now that this Form was recognized by the Kings of *Scotland*, after the Cession, is obvious from a Grant *Anno* 1587, wherein *James* the VI. confers these Islands upon the Chancellor and Justice Clerk, *cum potestate curiæ capitalis vocat. LAWTINGS assignandi*; and the same Expresssion is repeated in the Grants to the Earls of *Orkney*, particularly to *Robert* the first Earl, *Anno* 1589; and hence it is, that in a Record of the publick Transactions of these Islands
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under Earl *Patrick* the Son of *Robert*, from the 1601, to the 1604, many Laws and Acts are enacted, as in a distinct Country, having the free Administration of its own Affairs.

And as they were understood to have the Powers of enacting their own Constitutions, so they had their peculiar Officers for the Administration of Justice; the principal of whom was their *Legifer* or *High Foud*; and the *Under Foud*, which resembles our High-Sheriffs and their Deputes; and these Judges were understood to discharge their Office agreeable to the proper Laws and Constitutions of the Country, even after the Cession of these Islands to the Crown of *Scotland*, and this after these *Fouds* derived their Authority from the Governors of *Orkney*, appointed by the Kings of *Scotland*. Thus when *Gilbert Balfour* Master of Household to King *Henry* and *Q. Mary*, Anno 1565, was appointed Governor of these Islands, he is impowered to administer Justice *secundum consuetudinem patriæ*; and in the Grant above mentioned to the Chancellor and his Collegue, beside the Right of convocating and adjourning the *Lawting*, and of appointing *Fouds*: These *Fouds* are ordained to administer Justice *secundum leges & consuetudinem patriæ Orcadensis & Zelandiæ*. And again, in the *Reddendo* of the same Grant, *Agem. & facien. nobis, & successoribus nostris pro dictis officiis Justiciariorum & Foudæ debitam & legitimam administrationem justitiæ liedgiis & incolis dictarum patriarum Orcaden. & Zelandiæ, aliisque quibus decet, secundum leges & consuetudinem earund. & formam justitiæ in iisdem prius usitat*. And in the very same Terms is the Grant Anno 1589, to *Robert* Earl of *Orkney*, and the other new Grant to *Patrick*, Anno 1600, conceived. And wherever any new or special Method of Succession was meant to be introduced there, even of consent of the Party whose Succession was intended to be regulate, as Succession there went on a very different Method from what it does here in *Scotland*: In these Cases a special Grant from the Crown, dispensing

sing with the Law of the Country was understood to be necessary; thus *Q. Mary, Anno 1566*, grants an Estate in *Orkney* to *Gilbert Balfour* of *Westray*, and his Heirs-male, *Sic quoad omni tempore futuro unicus haeres masculus succedit post alium, quamdiu vixerat possideat & gaudeat hasce terras, secundum consuetudinem Scotiae, non obstan. legibus patriae Orcaden. eand. gavisionem seu possessionem recusantibus.* And also in another Grant, *Anno 1587*, by the Crown to *Hugh Sinclair* of *Burgh*, of an Estate in *Zetland*, and to his Heirs, *secundum formam & modum successionis infra regnum nostrum Scotiae observat. sciz. quod unus haeres immediate post alterum succedet absque divisione, non obstan. legibus & consuetudinibus patriae Zelandiae in contrarium observat.* And the same Rule of Succession is repeated in another Grant to *Mudie* of *Breaknesh*, *Anno 1591*. And a Variety of other Instances might be condescended on, to show that the Succession to Lands in this Country was rather Judaic than feudal, and that without a special Grant from the Crown, acquiesced in by the Person concerned, their Customs were not understood to be inserted. From all which, as it does not appear that ever the Nature of the *Skat* was changed by any general Law, so it could import in later Times no other Thing than it did in more ancient, namely, that it was the Cess payable to the State; and consequently the Exaction of it now is a Grievance which ought to be redrest.

The Petitioners, from looking into the Records, cannot help observing, that, as early as the 1575, their Oppressions begun under *Robert* the first Earl of *Orkney*, who, being natural Brother to the Queen, loaded them with many Hardships. This appears from the Records of the Privy Council 31st *January 1575*, in these Words: ‘ Forsaemeikle as my Lord Regent, and the Lords of Secret Council, considering the many and divers Complaints made by sundry Inhabitants of the Countries of *Orkney* and *Zetland*, for that
 ‘ they

' they are not only heavily troublit, herreit and oppressit by
 ' Companies of Sudarts, (Soldiers) and others broken Men,
 ' depending upon Lord *Robert Steuart*, but also are sae hal-
 ' den under Thraldome and Tyranny, that they can have nae
 ' Passage, neither by Sea nor Land, to repair to thir Parts to
 ' complain hereupon, and suite Redress and Remeid by Course
 ' of Justice, or yet to do others their lawful Errands and Busi-
 ' nels, as our Sovereign Lord's free Leiges, being expressly
 ' inhibite thereto be Proclamation, and the Ferries and all o-
 ' ther common Passages stopt by the said Sudarts, and others
 ' bearing Charge of the said Lord *Robert*, wherethro' the said
 ' Countries and Inhabitants thereof is able to be all utterly
 ' herriet and wrackt for ever.'

And not long after Commissioners are sent to enquire into
 the Truth of the many high Attempts, inordinate Oppressi-
 ons and undue Exactions, daily committed upon, and com-
 plained of by the Inhabitants of *Zetland*.

And again, from the Records of the Privy Council 1609
 and 1611, Earl *Patrick*, the Son of the said *Robert*, follow-
 ing his Father's Footsteps, thought proper to continue the
 same Oppressions, and thereupon fell a Sacrifice to publick
 Justice. The particular Enormities he had committed are not
 specially enumerated; but, from a Commission *Anno* 1612 to
 the Bishop of *Orkney*, several undue pecuniary Exactions may
 be suppoled to have made Part of them, for the Bishop's Com-
 mission runs in these Words, ' Forsaemeikle as the Govern-
 ' ment of the Countries of *Orkney* and *Zetland* has been in-
 ' terrupted, neglected and overseen, partly by the Iniquity
 ' of bypast Times, and partly by the Rebellion of *Patrick*
 ' Earl of *Orkney*, who abusing that Credit and Trust which
 ' his Majesty reposed in him, did, under Colour of his Ma-
 ' jesty's Princely Authority, commit many great Enormities
 ' and Insolences upon his Majesty's poor People, Inhabitants
 ' within the said Bounds, whereon many Complaints have
 ' been made, and sufficiently qualified in Presence of the Lords
 ' of

of Privy Council, for whilk the said Earl is now Prisoner, &c. These Facts tend to show how early the Inhabitants of these Islands were inured to Oppressions; and as the Poverty thereby drawn on them, their Distance from the Seats of Justice, their Ignorance of the Laws of *Scotland*, rendered their Access to Redress so very difficult, it cannot be wondred, if, more or less, they submitted to these Grievances; and as little can it be any Surprise, that now, under a milder Government, and when the Access to Justice is now patent to all the Lieges, they make an Effort to have their Rights duly ascertained.

Certain it is from the Records, that, for some considerable Time after the first Grants of these Islands to the Farmers, they did not yield above 400 *l. Scots* of an annual Revenue to the Crown or its Grantees, which at this Day is now swelled so as to compose a very great Estate.

